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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-89

EVANS THEATRE CORPORATION d/b/a LOEW'S GRAND THEATRE, JOHN MARVIN SMITH AND JOHN HEBERT,

Petitioners,

v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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v.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; HINSON McAULIFFE, SOLICITOR GENERAL OF THE CRIMINAL COURT OF FULTON COUNTY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Georgia on March 4, 1971, and the Motion For Rehearing denied on March 18, 1971.

OPINION BELOW

The decision of the Supreme Court of Georgia is reported at 227 Ga. 377, ____ S.E. 2d ____. The Order

overruling the Motion For Rehearing is without an opinion, and is noted at 227 Ga. 377, ____ S.E. 2d ____. Both judgments are printed in Appendix A.

JURISDICTION

The decision of the Supreme Court was entered on March 4, 1971. Timely application for rehearing was filed and denied on March 18, 1971. On June 11, 1971 Mr. Justice Black extended the time within which to file a petition for a writ of certiorari up to and including July 17, 1971.

The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3) since rights, privileges and immunities guaranteed to petitioners by the United States Constitution were infringed by the judgment of the Georgia Supreme Court.

QUESTIONS PRESENTED

I. Are the Georgia Nuisance Statutes constitutionally inadequate as a means of controlling obscenity since there are no procedural safeguards to protect legitimate expression?

II. Are the Georgia Nuisance Procedures and Statutes constitutionally defective since no burden is placed on the censor-prosecutor to come forward with evidence and the censor-prosecutor presented no evidence at the trial?

III. Is the film, *I Am Curious* (*Yellow*) constitutionally protected expression?

CONSTITUTIONAL PROVISIONS

Constitution of the United States:

First Amendment

> Congress shall make no law respecting on establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The Georgia Nuisance Statutes are set forth in Appendix B.

STATEMENT OF THE CASE

A complaint was filed on September 30, 1970 by the district attorney and solicitor general to enjoin and seize the movie, *I Am Curious (Yellow)*, and to declare it obscene within the meaning of 26 Ga. Code 2101. A hearing was scheduled for the next morning October 1, 1970, the day the movie was due to commence showing, but was delayed till October 2 because of the filing of a removal petition (R-63). The movie began its run on October 1.

Counsel for petitioners (hereafter called the theatre) asked for a continuance to prepare the defense (R-64), but this was denied because petitioners would not agree to discontinue showing the movie pending a continuance. Counsel for petitioners from the start questioned the legality of the proceedings below (R-69). There is no code section for such a seizure, no standards are set as to time limits and appeal procedure (R-78). The problem of self incrimination that might arise from turning over a film upon which later criminal proceedings may be based is left unresolved (R-70). See *Delta Book Distributors, Inc.* v. *Cronvich*, 304 F. Supp. 662 (ED La. 1969). Respondents (hereinafter called the State) were apparently proceeding on the theory that the hearing was some sort of adversary hearing required before the film could be seized, if found obscene.

The unverified complaint alleges that the dominant theme of *Curious* appeals to the prurient interest *and* that it substantially exceeds customary standards *and* that it is wholly without redeeming social value (R-36-38). The State introduced no testimony, relying entirely on the showing of the film to establish its case. (It did submit the scenario; Respondent's exhibit No. 1).

While admitting that there were "much worse" movies showing in Atlanta (R-80; see also R-95), the State contended that *Curious* was obscene because its sexual scenes, approximately ten to fifteen minutes of a movie lasting about two hours (R-113), were unrelated to the political and social themes of the movie (R-92, 93). The State seems to say that the portrayal of actual or simulated cunnilingus and fellotio would per se make the movie obscene (R-90).

The State also attempted, without evidence and over

objection, to blame *Curious* for the present state of movies in the United States (current community standards?). It claimed that "now in practically every city in the United States" you find films "in which every perversion is shown for the entire duration" (R-95). When counsel for the theatre objected to the lack of evidentiary basis for attributing this alleged state of affairs to *Curious*, the trial judge said he would nevertheless "take it into consideration" (R-96).

The theatre unsuccessfully contended that the court below was precluded by a type of res judicata or was estopped from holding *Curious* to be obscene because of the decision of *I Am Curious* v. *U.S.A.*, 404 F. 2d 196, (2nd Cir. 1968) holding the movie to be non obscene (R-71). The theatre put on testimony by two competent witnesses that the dominant theme of *Curious* is not to the prurient interest (R-125, 126), that it concerns a young girl searching for her political, social, religious and sexual identity (R-110). Several of the sexual scenes have a direct and obvious political meaning (R-111). The sexual aspect of the movie is necessary to personalize the heroine's search and to keep the movie from being a mere political commentary (R-125). A number of favorable reviews attesting to the worth of the movie were put in evidence (Petitioners' exhibits 1-10; R-210-227). The subdued nature of the advertising for the movie was shown (R-77, 78; Petitioners' exhibit 12; R-230). The film is a good example of "naturalistic cinemaphotography" (R-124).

Other films being shown in the Atlanta community are more sexually explicit than *Curious* (R-106). Some relate only to sexual matters (R-117). It was never quite clear what standard of obscenity, national or local, was

being followed. The State pointed out that there had been an initial finding that *Curious* was "against the national standards" (R-81), which was later reversed by the decision at 404 F. 2d 196. But the trial judge found that "the moral standards of *this* community go far beyond that set by" *Curious* (R-134).

The trial judge admitted that large parts of *Curious* had political and social content. He pointed out that the first forty-five minutes were concerned entirely with the heroine's search for truth, honesty and morality (R-132, 133). He admitted that he did not know what was being shown in other theatres or even of the existence of some of them (R-133). The theatre asked unsuccessfully that he view some of the films of these other theatres, even offering to pay the admissions (R-104).

The judge would not be pinned down as to whether *Curious* was "utterly" without social worth (a finding required by 26 Ga. Code 2101, as well as the decisions). To the question of whether it was utterly without social worth, he replied: "I am finding this movie is obscene within the purview of the Georgia law" (R-136). He would not allow time for the theatre to file a brief (R-132).

The theatre asked that the appeal and the preparation of the record be expedited (R-136; notice of appeal R-30). The hearing was held on October 2, 1970. The record was docketed in the Supreme Court of Georgia on November 5, 1970, and the decision was rendered on March 4, 1971.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND IS THEREFORE INCORRECT.

A. *The Writ should be granted since the Georgia Nuisance Statutes have no procedural safeguards to protect legitimate expression, and are constitutionally inadequate as a means of controlling obscenity.*

Georgia Code Section 72-101, 72-102, 72-201 and 72-202 sets out a statutory scheme for the prohibition and abatement of nuisances. Nothing is mentioned about exhibiting obscene films. Georgia Code section 72-3 is entitled "Houses of Prostitution," and the statutes under this section again make no mention of the exhibiting of obscene films. Georgia Code Section 72-4 is entitled "Nuisances in Cities" and 72-401 gives the police court jurisdiction to abate a nuisance.

The decision of the Georgia Supreme Court made no reference to which statute the State was proceeding under, but did cite as authority *Lee* v. *Hayes*, 215 Ga. 330, 331, 110 S.E. 2d 624 (1959). In that case Georgia Code sections 72-201 and 72-301 are cited as giving the solicitor general a cause of action for abatement of a public nuisance, being the operating of a lewd house. In the *Lee* case the petition alleged gambling was going on, and illegal beer and whisky was being sold.

The Georgia statutes have insufficient procedural safeguards for dealing with obscenity. Ga. Code section 72-303 gives the defendant three days' notice, and if he asks for a continuance the temporary injunction shall be granted as a matter of course. Apparently the final trial shall be at the first term of the court (Ga. Code

section 72-305). In the Fulton County Superior Court the average time to get to a jury in a civil case is approximately thirteen months. (Findings of May-June 1971 Fulton County Grand Jury). The Georgia rule that equity cases shall be tried at the first term is a relic of the past. Also terms of Court vary from two months in Fulton County to as much as six months in certain rural counties.

Georgia Code section 72-302 permits an ex parte injunction. Georgia Code sections 72-304, 72-306, 72-308, 72-309 and 72-311 provide stiff penalties if the temporary injunction is violated. A clear reading of these statutes show that once the temporary injunction is granted the suppression of the film is, in essence, complete.

In the instant case the Court issued the temporary injunction on October 2, 1970, and a decision by the Georgia Supreme Court was not rendered until March 4, 1971. Counsel for petitioners acted as quickly as possible in prosecuting the appeal, but it still took over five months for an appellate decision.

It is apparent that such a scheme, when applied to the delicate problem of separating constitutionally-protected materials from those which may be regulated by government, falls short of the required constitutional standard under the First and Fourteenth Amendments.

First, no standard of what constitutes a statutory nuisance appears in the statute. The overbreadth of the statutory description of what is prohibited is inimical to obscenity standards enunciated in recent Supreme Court decisions. See *Memoirs* v. *Massachusetts*, 383 U.S. 413 (1966); *Redrup* v. *New York*, 386 U.S. 767 (1967); *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Second, despite the penalties of a harsh and quasi-criminal nature, the statutory scheme makes no provision for a requirement of *scienter*, criminal intent or guilty knowledge, an essential ingredient of legitimate governmental regulation of obscenity. *Smith* v. *California*, 361 U.S. 147 (1961).

Third, the statute shifts the burden of proof of the non-obscenity of the material charged to be a nuisance to the accused, although the burden of proving that material is obscene, and therefore, unprotected expression, must rest upon those who would suppress it. See *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965).

Fourth, the statute allows ex parte injunctions against nuisances, including films claiming First Amendment protections, without a prior adversary determination of the obscenity of the material restrained or in the alternate the temporary injunction is granted if the defendant asks for a continuance. Such a statutory scheme is clearly prohibited under decided Supreme Court case law. *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Freedman* v. *Maryland*, 380 U.S. 51 (1965).

Fifth, although the statutory scheme permits pre-censorship of materials which claim First Amendment protection, it provides no procedural assurance of an immediate hearing, after either temporary or permanent restraint, no assurance of an immediate judicial decision thereafter, and no assurance of a speedy and accelerated judicial review. Such a censorship system is constitutionally impermissible. *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Freedman* v. *Maryland*, 380 U.S. 51

(1965); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139, 141-142 (1968).

Sixth, the statute makes no distinction between private possession and public dissemination of obscene materials charged as nuisances, and applies sanctions against both. Governmental regulation of private possession and use of obscenity is constitutionally impermissible. See *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

Seventh, the penalties are so broad and sweeping (including the closing of a theater for a year even as to exhibition of non-obscene films; see Georgia Code section 72-309) and so unnecessarily oppressive and punishing as to inhibit the resolution of such constitutional questions as the obscenity of particular materials in courts under procedures designed to safeguard the dissemination of borderline materials. *Smith* v. *California*, 361 U.S. 147 (1961); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958).

Thus, it is apparent that the Georgia Nuisance Statute as an instrument of governmental regulation of obscenity, falls short of the constitutional mark. It is now beyond argument that "[s]tate regulation of obscenity must 'conform to procedures that will insure against the curtailment of constitutionally protected expression, which is often separated from obscenity by a dim and uncertain line' *Bantam Books* v. *Sullivan*, [372 U.S. 58, 66 (1963)]." *Quantity of Books* v. *Kansas*, 378 U.S. 205, 210 (1964).

Two courts have come to grips with whether a state can control obscenity on the theory of a public nuisance in an equity proceeding. In *Grove Press* v. *Philadelphia*,

418 F. 2d 82 (CA 3, 1969), and *Commonwealth* v. *Guild Theatre, Inc.*, 432 Pa. 378, 248, A. 2d 45 (1968), it was held that, on strikingly similar set of facts as the instant case, the State of Pennsylvania procedural scheme lacked the safeguards citing *Freedman* v. *Maryland*, supra.

Appellants are aware of no case in which this Court has yet considered the constitutional implications of a nuisance statute of the type here involved. In an area in which sensitive control procedures are constitutionally compelled, this Court's consideration of this issue is imperative.

II. THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. *The writ should be granted since no burden is placed on the censor-prosecutor to come forward with evidence under the Georgia Nuisance Statutes, and the censor-prosecutor presented no evidence at the trial.*

The trial court ordered the respondents to bring the film to court for showing based on the complaint filed by the respondents (R-39). The respondents presented no evidence during the trial except the showing of the film.

In *Freedman* v. *Maryland*, *supra*, at page 58 the Supreme Court said:

> "First, the burden of proving that the film is unprotected expression must rest on the censor."

In *Speiser* v. *Randall*, 357 U.S. 513, 526, it was held that:

> "Where the transcendent value of speech is involved, due process certainly requires . . . that the

state bear the burden of persuasion to show that appellants engaged in criminal speech."

Petitioners also rely on *United States* v. *Klaw*, 350 F. 2d 155 (2nd Cir., 1965) and *Hudson* v. *United States*, 234 A. 2d 903 (Ct. App. D.C. 1967) where the failure of the government to prove contemporary standards required the granting of a motion for directed verdict.

Applying the foregoing law to the instant case, the trial court was compelled to find *I Am Curious* (*Yellow*) not obscene since the State of Georgia did not carry the burden.

III. THE CASE IS OF MAJOR IMPORTANCE TO SECURE NATIONAL RIGHTS AND UNIFORMITY OF JUDGMENT.

A. *The Writ should be granted since the film is Constitutionally Protected Expression.*

Ever since *Roth* v. *United States*, 354 U.S. 476 (1957), this Court has assumed the responsibility of devising formulae for recognizing the "dim and uncertain line," *Bantam Books* v. *Sullivan*, 372 U.S. 58, 66 (1963), which separates obscenity from protected expression.

While *Roth* attempted to provide analytic tools for the separation of protected from unprotected expression, a majority of the Court has yet to agree on a precise test for determining obscenity.

The current verbal formula which probably represents a consensus of the Court first appeared in *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966).

"Under [the Roth] definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest

in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description of representation of sexual matters; and (c) the material is utterly without redeeming social value."

That this formula has been unsuccessful in providing guidance to lower state and federal courts in determining whether the film in issue here is entitled to constitutional protection is readily apparent.

Applying these criteria, the Second Circuit Court of Appeals held the film to be constitutionally protected expression. *United States* v. *I Am Curious (Yellow)*, 404 F. 2d 196 (CA 2, 1968). That Court, applying the *Memoirs* standards, found "that the picture cannot be classified as obscene on at least two of the three grounds comprising the test." The Court continued:

"Although sexual conduct is undeniably an important aspect of the picture and may be thought of as constituting one of its principal themes, it cannot be said that 'the dominant theme of the material taken as a whole appeals to a prurient interest in sex.' Whatever the dominant theme may be said to be (see footnote 2 supra) it is certainly not sex. Moreover, not only is the sexual theme subordinate, but it is handled in such a way as to make it at least extremely doubtful that interest in it should be characterized as 'prurient.'

"It is even more clear that 'I Am Curious' is not utterly without redeeming social value. Whatever weight we may attach to the opinions of the 'experts' who testified to the picture's social importance, and whether or not we ourselves consider the ideas of the picture particularly interesting or the production artistically successful, it is quite certain that 'I Am Curious' does present ideas and does strive to present

these ideas artistically. It falls within the ambit of intellectual effort that the first amendment was designed to protect."

Lordi v. *UA New Jersey Theaters, Inc.*, 108 N.J. Supp. 19, 259 A. 2d 734 (1969), reached a similar result.

Applying identical criteria, however, the Maryland Court of Appeals, albeit by 4-3 decision, held the very same film to be obscene, *Wagonheim* v. *Maryland State Board of Censors*, 258 A. 2d 240 (Md. 1969). The Supreme Court affirmed by an equally divided court. *Grove Press, Inc.*, et al. v. *Maryland State Board of Censors*, ___ U.S. ___, 28 L ed 2d 205 (1971).

These disparate results in judicial attempts to classify the same film as inside or outside First Amendment protection, characterized by narrow majorities and vigorous dissents, demonstrate not only the uncertainty of application of this Court's obscenity standards in the various state and federal jurisdictions in the nation, but the need for this Court to speak on the issue here presented.

The record in the case at bar provides an abundant opportunity for this Court to unify these fragmented and irreconcilable decisions. Despite the fact that the burden of proof of the obscenity of a film must rest upon those who would suppress it, *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965), petitioners presented sufficient evidence that the film was not obscene and bringing the film under the protection of *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418 (1966).

This case allows the Court to clarify what is now obscure, and to make more consistent the administration of its own constitutional doctrine. For uncertainty of

application of law, always difficult under any circumstances, is intolerable where freedom of expression is involved.

In *Redrup* v. *New York*, 386 U.S. 767 (1967), "which may yet prove to be the most significant of its obscenity opinions," *Commonwealth* v. *Dell Publications*, 427 Pa. 189, 233 A. 2d 840 (1967), the Court, faced with the issue of the obscenity of such literary gems as two paperback books entitled "Lust Pool" and "Shame Agent," and ten so-called "girlie" magazines, noted its own philosophic differences on the general subject of obscenity, and, for the first time, abandoned any attempt to articulate a precise test for determining what it is. Instead, the *per curiam* opinion focused its attention upon several specific kinds of conduct by a purveyor which government may have a more significant interest in controlling, and which, if present in the *Redrup* cases, might have evoked a more punishing response from the Court.

> "In none of the [Redrup] cases was there a claim that the statute in question reflected a specific and limited, state concern for juveniles. See *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 * * *. cf. *Butler* v. *State of Michigan*, 352 U.S. 380 * * *. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. *Breard* v. *City of Alexandria*, 341 U.S. 622 * * *; *Public Utilities Commission of District of Columbia* v. *Pollak*, 343 U.S. 451 * * *. And in none was there evidence of the sort of 'pandering' which the court found significant in *Ginzburg* v. *United States*, 383 U.S. 463 * * *." 386 U.S. at 769.

The Ninth Circuit Court of Appeals has concluded

that "rotten books [and films] * * * obsessed with sex," without literary merit, which "at best * * * are junk" are, according to current constitutional doctrine, protected by the First Amendment, unless accompanied by "pandering," distribution to juveniles or an obtrusive assault on unwilling adults, the only "proscriptions left." *Grant* v. *United States*, 380 F. 2d 748, 749 (9th Cir. 1967).

This Court must make its own determination as to whether the film is "utterly without redeeming social value." It is submitted that this Court could not sit through the first 45 minutes of the film (there is no sexual matter in the film up until that time) and fail to understand that Lena is a young girl who is curious and actually more than curious! She engages in extensive questioning of the political and social values of her country and her personal values. One cannot help but equate this young woman and her questioning and rebellious spirit to the youth of our country today and their questioning of "the establishment." The story is very relevant today and the sexual matter in the film is related to Lena's search for honesty in all levels of her life and in her search for equality.

If this Court will apply national community standards (*Jacobellis* v. *Ohio*, 378 US 184; 1969) and view the film as to its social value, rather than weigh the sexual matter standing alone, outside the theme, it will conclude that the finding of obscenity is erroneous and should be reversed.

CONCLUSION

This Petition For A Writ of Certiorari has attempted to present a brief description of the substantial issues presented and why this Court should give plenary consideration to them. The lower courts, federal and state, are in direct conflict to each other as to the issues raised. The protection of freedom of expression is paramount in a free society.

For the above reasons the Petition For Writ of Certiorari should be granted, the judgment below reversed, the Georgia statutory scheme be declared constitutionally inadequate as a means of controlling obscenity and the film be returned to petitioners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I duly mailed copies of the foregoing Petition For A Writ of Certiorari to Honorable Arthur Bolton, Attorney General of Georgia, State Judicial Building, Atlanta, Georgia, Hon. Lewis R. Slaton, District Attorney, Atlanta Judicial Circuit, Fulton County Courthouse, Atlanta, Georgia and Hon. Hinson McAuliffe, Solicitor General of the Criminal Court of Fulton County, Civil and Criminal Court Building, Atlanta, Georgia on the _____ day of July, 1971.

GLENN ZELL

APPENDIX A

OPINION OF THE GEORGIA SUPREME COURT

26249. EVANS THEATRE CORPORATION et al. v. SLATON.

1. The trial court did not err in finding the film "I Am Curious (Yellow)" to be obscene.

2. The courts of this State are not estopped from finding a film obscene because of a holding by the United States Court of Appeals, Second Circuit that the same film is not obscene.

3. The State has an interest in the welfare, peace, and good order of its citizens and communities, and may in a proper case maintain an action at the instance of the district attorney to enjoin an existing or threatened nuisance, even though the nuisance constitutes a crime punishable under the criminal laws.

4, 5. The injunction in the present case must be considered as an interlocutory one, and the obscene material can not be destroyed as contraband at the interlocutory stage.

6. The trial judge did not abuse his discretion in denying a continuance to appellants.

7. It is a crime under our criminal law (*Code Ann.* § 26-2101) to exhibit an obscene film to the public even though minors are not invited to view it.

ARGUED JANUARY 13, 1971—DECIDED MARCH 4, 1971—REHEARING DENIED MARCH 18, 1971.

Injunction. Fulton Superior Court. Before Judge Shaw.

Albert M. Horn, Glenn Zell, Margie Pitts Hames, for appellants.

Lewis R. Slaton, District Attorney, Hinson McAuliffe, Solicitor, Thomas E. Moran, Frank A. Bowers, Keating, Clancy, Bertsch & Johnston, for appellee.

MOBLEY, Presiding Justice. Lewis R. Slaton, District Attorney of the Atlanta Judicial Circuit, and Hinson McAuliffe, Solicitor of the Criminal Court of Fulton County, brought a complaint in Fulton Superior Court against Evans Theatre Corporation, operator of Loew's Grant Theatre, a motion picture theatre in Atlanta, and Marion Smith and John Herbert, managers of the corporation, alleging that defendants have advertised in the local papers the showing of a film, "I Am Curious (Yellow)," which is obscene within the definition of obscene materials in *Code Ann.* §26-2101 (Ga. L. 1968, pp. 1249, 1302), and its exhibition is prohibited by that section. Plaintiffs demanded that rule nisi issue, the film be declared obscene and subject to seizure, and defendants be temporarily and permanently enjoined from exhibiting the film within the jurisdiction of the court.

After a hearing, the trial judge held that the film "I Am Curious (Yellow)" is obscene and subject to seizure. It was ordered that all copies in the possession of defendants be seized, and that defendants, their associates, agents, and employees, be restrained and enjoined from distributing, exhibiting, or otherwise showing the film in any theater or other place where the public is permitted within the jurisdiction of the court.

Defendants filed an appeal from this judgment, making the following enumerations of error: The court erred (1) in finding and holding the film "I Am Curious (Yel-

low)" to be obscene; (2) in enjoining appellants from showing or exhibiting the film; (3) in ordering the film seized as contraband; (4) in proceeding with the complaint in the absence of statutory standards, provision for jury trial, and other constitutional safeguards; (5) in refusing a continuance to appellants where the complaint was unverified and no showing of urgency was made; (6) in not holding that the State was estopped or precluded from prosecuting the complaint because of the Federal Court of Appeals (404 F2d 196) holding the film not to be obscene; and (7) in finding and holding that *Code Ann.* §26-2101 extends to the exhibiting of an alleged obscene film to consenting adults.

1. The first error enumerated is the finding that the film is obscene.

The General Assembly has defined obscene material as follows: "(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters." *Code Ann.* §26-2101.

At the hearing the trial judge viewed the film before making his finding that it was obscene. Counsel for appellants have made the film available for our viewing of it, and we have done this.

The film was produced in Sweden. It shows a young Swedish woman questioning the social, political, and moral values of her own country and other countries. She meets a young man and immediately engages in

sexual intercourse with him. In extended scenes the young woman and her sex partner are shown completely nude and, in the course of the film, they engage in numerous acts of sexual intercourse, natural, unnatural, bizarre, and violent. In a dream fantasy the young woman murders and castrates her sex partner. All of these scenes are explicit.

Appellants urge that the two expert witnesses testifying in their behalf explained that the film's main or dominant appeal is to social, political, and moral issues, and that the scenes portraying sexual activity were essential to, and integrated with, the film's main political and moral themes, and do not exceed the standards embodied in other films and books being shown in the country.

Appellants contend that the failure of appellees to introduce any evidence of community standards to determine the question of obscenity requires a reversal of the judgment finding the film obscene, and cite Hudson v. United States, 234 A2d 903, a case in the District of Columbia Court of Appeals, in which a criminal conviction was reversed because the Government offered no evidence of community standards prevailing in the nation generally. We are, of course, not bound by that decision.

In Jacobellis v. Ohio, 378 U.S. 184 (84 SC 1676, 12 LE2d 793), in an opinion concurred in by two Justices of the United States Supreme Court, it was stated that the "contemporary community standards" by which they must determine the issue of the Federal constitutional rights of those convicted of crimes involving alleged obscene material were national standards. This

opinion did not suggest that State courts must have evidence of national standards of decency before them in order to make a determination as to whether material is obscene. The United States Supreme Court in the Jacobellis case made its determination as to whether the film there reviewed was obscene under "national" community standards by viewing the film itself. It is our opinion that the trial judge could make a decision in the same manner.

After viewing the film ourselves, we state without hesitation that the trial judge did not err in finding it obscene, whether viewed by the standards of our local community or national standards. We have no doubt that its predominant appeal is to prurient interest in nudity and sex, and we feel certain that it would never have been brought from Sweden to this country had it not had in it the explicit sexual scenes, which its promoters, no doubt, thought would appeal to the prurient interests of persons in this country, to the profit of the promoters. If the film does not go substantially beyond the customary limits of candor in representing sexual matters, then there are no limits of candor in this country.

Appellants urge that the film communicates ideas of a political and social nature and cannot be said to be "utterly without redeeming social value." Our statute making the distribution of obscene material criminal provides that the material must be "utterly without redeeming social value" to come within the definition of obscenity. *Code Ann.* §26-2101.

In Roth v. United States, 354 U. S. 476 (3c) (77 SC 1304, 1 LE2d 1498), the majority opinion of the United

States Supreme Court stated: "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests; but implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

Since the Roth decision many decisions have been written in this country expounding and enlarging upon the statement there made. In Memoirs v. Massachusetts, 383 U. S. 413, 419 (86 SC 975, 16 LE2d 1) in an opinion concurred in by less than a majority of the United States Supreme Court it was said: "A book cannot be proscribed unless it is found to be *utterly* without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive."

In Jacobellis v. Ohio, 378 U. S. 184 (3b), supra (in an opinion concurred in by two Justices) it was stated: "The constitutional status of allegedly obscene material does not turn on a 'weighing' of its social importance against its prurient appeal, for a work may not be proscribed unless it is 'utterly' without social importance."

The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. *Code Ann.* §26-2011 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the

people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public.

In Roth v. United States, 354 U. S. 476, 485, supra, the court quoted from Chaplinsky v. New Hampshire, 315 U. S. 568, 571 (62 SC 766, 86 LE 1031), as follows: "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . ."

The film we have viewed offends all sense of decency, and the fact that it contains some non-obscene matter does not preclude a finding that, considering it as a whole, it is utterly without redeeming social value. We affirm the ruling of the trial court that the film is obscene.

2. The sixth enumeration of error contends that the State was estopped or precluded from prosecuting the present complaint because of a holding by the United States Court of Appeals, Second Circuit, in the case of United States v. A Motion Picture Film Entitled "I Am Curious-Yellow," 404 F2d 196.

The majority opinion in that case held that the film was not obscene because its dominant theme was not sex, and that it was not utterly without redeeming social

value. The courts of Georgia are not bound by this decision, and the trial judge did not agree with it. Nor do we. It was not error for the trial judge to refuse to follow the Federal court decision cited.

3. In the present case the district attorney did not bring a proceeding to determine whether he might seize the film as evidence in a criminal case, but brought an action for injunction against the showing of the film. In the second enumeration of error it is asserted that the court erred in enjoining appellants from showing or exhibiting the film.

We recognize the principle that equity will take no part in the administration of the criminal law. *Code* §55-102. However, it has long been the rule in this State that the State has an interest in the welfare, peace, and good order of its citizens and communities, and that an action may be maintained at the instance of the prosecuting attorney to enjoin an existing or threatened public nuisance, even though the nuisance constitutes a crime punishable under the criminal laws. See: *Lofton v. Collins*, 117 Ga. 434 (3) (43 SE 708, 61 LRA 150); *Walker v. McNelly*, 121 Ga. 114 (1) (48 SE 718); *Edison v. Ramsey*, 146 Ga. 767 (92 SE 513); *Dean v. State*, 151 Ga. 371 (1) (106 SE 792, 40 ALR 1132); *Gullatt v. Collins*, 169 Ga. 538 (150 SE 825); *Rose Theatre, Inc. v. Lilly*, 185 Ga. 53 (1) (193 SE 866); *Atkinson v. Lam Amusement Co.*, 185 Ga. 379 (195 SE 156); *Forehand v. Moody*, 200 Ga. 166 (36 SE2d 321); *Norris v. Willingham*, 204 Ga. 441 (50 SE2d 22); *Thornton v. Forehand*, 211 Ga. 658 (87 SE2d 865); *Lee v. Hayes*, 215 Ga. 330, 331 (110 SE2d 624).

The exhibition of an obscene motion picture is a crime

involving the welfare of the public at large, since it is contrary to the standards of decency and propriety of the community as a whole. The welfare of the whole community is served by restraining the showing of such an obscene film.

A court of equity was authorized to enjoin the exhibition of this obscene motion picture to the public.

4. The fourth enumeration of error alleges that the court erred in proceeding with the complaint in the absence of statutory standards, provision for jury trial, and other constitutional safeguards.

We have held in the preceding division that the complaint could be maintained in equity, and there is no merit in the contention that there are no statutory standards, provision for jury trial, and other constitutional safeguards.

The complaint sought temporary and permanent injunction. The trial judge, on interlocutory hearing without a jury, restrained and enjoined appellants from exhibiting the film. The order did not indicate that it was interlocutory in nature. Direction is therefore given that the order be amended to show that it is not a permanent injunction, but only one to continue in force until the final hearing of the case by a jury. *Unity Cotton Mills v. Dunson*, 131 Ga. 258 (62 SE 179).

5. The third enumeration of error alleges that the court erred in ordering the film seized as contraband. Material determined to be obscene, after due hearing, would be contraband and subject to seizure and destruction. It would be against public policy to return obscene material to the owner. However, the destruction of the film must await a final determination of the question

of obscenity by a jury.

We therefore direct that the trial judge modify his order to show that no destruction of the film be made unless and until a final determination is made by the jury that it is obscene.

6. The fifth enumeration of error alleges that the court erred in refusing a continuance when no showing of urgency was made. Counsel made no contention that any particular witness could not be available for the hearing, but contended that he had not had time to prepare for it.

The film was being shown at the time of the hearing. This made it urgent that a determination of its obscenity be made immediately. The best evidence which could be obtained on the question of obscenity was the film itself, and the trial judge viewed the film before granting injunction. It was not an abuse of discretion to refuse a continuance to appellants.

7. There is no merit in the seventh enumeration of error, that the court erred in holding that the penal provision regarding obscene material (*Code Ann.* §26-2101) extends to the exhibiting of an obscene film to consenting adults.

Appellants cite Stanley v. Georgia, 394 U. S. 557 (89 SC 1243, 22 LE2d 542), in support of this contention. The Stanley case reversed a conviction for merely having possession of obscene material. It did not hold our statute prohibiting the exhibition of obscene material to be unconstitutional. The only purpose appellants had in possessing the film was to exhibit it to the public. The exhibition of such an obscene film to consenting adults is a crime in this state.

Judgment affirmed with direction. All the Justices concur.

APPENDIX B

RELEVANT SECTIONS OF THE GEORGIA CODE

Georgia Code 72-101. Definition in general.

A nuisance is anything that works hurt, inconvenience, or damage to another; and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. The inconvenience complained of shall not be fanciful, or such as would affect only one of fastidious taste, but it shall be such as would affect an ordinary reasonable man.

Georgia Code 72-102. Classes; public and private; definitions.

Nuisances are either public or private. A public nuisance is one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. A private nuisance is one limited in its injurious effects to one or a few individuals.

Georgia Code 72-201. Manner of abatement.

Any nuisance which tends to the immediate annoyance of the citizens in general, is manifestly injurious to the public health or safety, or tends greatly to corrupt the manners and morals of the people may be abated and suppressed by the order of any two or more justices of the peace of the county, founded upon the verdict of 12 freeholders of the same county, who shall be summoned, sworn, and impaneled for that purpose; which order shall be directed to and served by the sheriff of the county or his deputy. (Acts 1833, Cobb, 817.)

Georgia Code 72-202. Public nuisance, how restrained.

Private citizens may not generally interfere to have a

public nuisance enjoined, but the petition must proceed for the public on information filed by the solicitor general of the circuit. A public nuisance may be abated on the application of any citizen specially injured. (50 Ga. 451; 76 Ga. 806.)

CHAPTER 72-3. HOUSES OF PROSTITUTION

Georgia Code 72-301. Houses and contents declared a nuisance.

Whosoever shall knowingly erect, establish, continue, maintain, use, own, or lease any building, structure, or place used for the purpose of lewdness, assignation, or prostitution shall be guilty of maintaining a nuisance, and the building, structure, or place, and the ground itself in or upon which such lewdness, assignation, or prostitution shall be conducted, permitted, or carried on, continued, or shall exist, and the furniture, fixtures, musical instruments, and other contents of such building or structure are also declared to be a nuisance, and may be enjoined and abated as hereinafter provided. (Acts 1917 p. 178.)

Georgia Code 72-302. Action to enjoin nuisance, how and by whom brought; temporary injunction.

Whenever a nuisance is kept, maintained, or exists, as defined in the preceding section, the solicitor general or any citizen of the county may maintain an action in the name of the State upon the relation of such solicitor general or citizen to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building upon which such nuisance exists. In such action, the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained

of exists, order a temporary injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, or oral testimony or otherwise, as the complainant may elect, unless the court or judge, by previous order, shall have directed the form and manner in which the evidence shall be presented, that such nuisance does in fact exist. (Acts 1917, p. 178.)

Georgia Code 72-303. Notice of hearing on application.

Three days' notice in writing shall be given the defendant of the hearing of the application and, if then continued at his instance, the temporary injunction as prayed shall be granted as a matter of course. (Acts 1917, p. 179.)

Georgia Code 72-304. Injunction binding throughout judicial district. Contempt.

When an injunction shall have been granted it shall be binding on the defendant throughout the judicial circuit in which it was issued, and any violation of the provisions of the injunction shall be a contempt of court as hereinafter provided. (Acts 1917, p. 178.)

Georgia Code 72-305. Trial; time; evidence of reputation of place.

The action shall be triable as other cases in equity and at the first term of the court. In such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of such nuisance. (Acts 1917, p. 179.)

Georgia Code 72-308. Violation of injunction; punishment for contempt; proceedings.

In case of the violation of any injunction granted under the provisions of this Chapter the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceeding shall be commenced by filing with the clerk of court an information under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may demand the production and oral examination of the witnesses. A party found guilty of contempt shall be punished as for contempt in the discretion of the judge. (Acts 1917, p. 179.)

Georgia Code 72-309. Abatement, order of; contempt of court; fees for removing and selling property.

If the existence of the nuisance shall be established in an action as provided in this Chapter, and order of abatement shall be entered as a part of the judgment in the case, which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or other movable property used in conducting the nuisance and shall direct the sale thereof in the manner provided for the sale of chattels under execution: Provided, that if it shall appear to the judge that the furniture and chattels are owned by others than the inmates of said house, he may order the effectual closing of the building or place against its use for any purpose, and keeping it closed for a period of one year, unless sooner released. If any person shall break and enter or use a building, structure, or place so directed

to be closed, he shall be punished as for contempt as provided in the preceding section. For removing and selling the movable property, the officer shall be entitled to charge and receive the same fees as he would for levying upon and selling like property on execution, and for closing the premises, and keeping them closed a reasonable sum shall be allowed by the court. (Acts 1917, p. 180).

Georgia Code 72-311. Bond to abate; release of property.

If the owner shall appear and pay all cost of the proceedings, and file a bond with sureties to be approved by the clerk in the full value of the property, to be ascertained by the court, or, in vacation, by the clerk, conditioned that he will immediately abate said nuisance and prevent the same from being established or kept within a period of one year thereafter, the court, or in vacation, the judge, may, if satisfied of his good faith, order the premises, closed under the order of abatement, to be delivered to said owner, and said order of abatement canceled so far as the same may relate to said property; and if the proceedings be an action in equity, and said bond be given and cost therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from any judgment lien, penalty or liability to which it may be subject by law. (Acts 1917, p. 180.)

CHAPTER 72-4. NUISANCES IN CITIES

Georgia Code 72-401. Manner of abatement; jurisdiction of police court.

If a nuisance complained of shall exist in a town or city under the government of a mayor, intendant, aldermen, wardens, or a common council or commissioners, such nuisance, by and with the advice of said aldermen, wardens, council, or commissioners, may be abated and removed by order of said mayor, intendant, or commissioners; but if the nuisance complained of shall exist in a city having a population of 20,000 or more, the police court of such city, whether known as mayor's or recorder's court or otherwise designated, shall have jurisdiction to hear and determine the question of the existence of such nuisance, and, if found to exist, to order its abatement, which order shall be directed to and executed by the Sheriff or the marshal of said town or city, or his deputy. (Act 1833, Cobb, 817. Acts 1892, p. 64.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-89

EVANS THEATRE CORPORATION, d/b/a LOEW'S GRAND THEATRE; JOHN MARVIN SMITH; AND JOHN HERBERT,

Petitioners,

vs.

LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; AND HINSON McAULIFFE, SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

EVANS THEATRE CORPORATION, d/b/a LOEW'S GRAND THEATRE; JOHN MARVIN SMITH; AND JOHN HERBERT,
Petitioners,
vs.
LEWIS R. SLATON, DISTRICT ATTORNEY, ATLANTA JUDICIAL CIRCUIT; AND HINSON McAULIFFE, SOLICITOR GENERAL, CRIMINAL COURT OF FULTON COUNTY, GEORGIA,
Respondents.

NO. 71-89

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PART ONE

Come now LEWIS R SLATON, District Attorney, Atlanta Judicial Circuit, and HINSON McAULIFFE, Solicitor General, Criminal Court of Fulton County, Georgia, Respondents named herein, and pray that the Application for Writ of Certiorari to the Supreme Court of Georgia be denied, because the decision of the Court below is not reviewable at the present time, and because said decision involves no substantial federal question.

OPINION BELOW

The decision sought to be reviewed by this Court is reported at 227 Ga. 377 (1971) and 180 S.E. 2d 712. It is also set out as "Appendix A" of the Petitioner's Brief.

JURISDICTION

While Petitioners aver that jurisdiction to consider the decision is found in 28 U.S.C. Section 1257(3), Respondents deny that the issue is subject to review by this Court since the decision sought to be reviewed is not yet final, as will be hereinafter shown.

QUESTIONS PRESENTED

I. Is the Georgia Supreme Court's decision "final" within the meaning of 28 U.S.C. Sec. 1257, when said decision relates only to a temporary injunction, and contemplates a jury trial on the merits?

II. May the commercial exhibition of an obscene film be enjoined as a public nuisance?

III. If the commercial exhibition of an obscene movie may be enjoined as a public nuisance, do the Georgia Statutes relating thereto conform to due process when utilized for such purpose?

IV. Is the motion picture film "I Am Curious (Yellow)" obscene?

STATUTES INVOLVED

Although Petitioners have set out as the Georgia Statutes involved Georgia Code Title 72, Nuisances, additional statutes, state and federal are involved in the consideration of the application. They are as follows:

1) 28 U.S.C. Section 1257(3);

2) Georgia Code Chapter 26-21, as amended by Ga. Laws 1971, p. 344;

3) Georgia Code Section 26-2011, Public indecency;

4) Georgia Appellate Practice Act, Section 1(a)(3), Ga. Laws 1965, p. 18, as amended, particularly by Ga. Laws 1968, p. 1072 at 1073.

STATEMENT OF THE CASE

After Petitioners advertised that they would exhibit in Atlanta, Fulton County, Georgia, for an admission fee, the film "I am Curious (Yellow)" Respondents filed a compiaint against them. The complaint was entitled "Complaint to Declare Motion Picture Obscene and Subject to Seizure". Among other things the prayers requested that a Rule Nisi issue requiring Petitioners to show cause on a date certain why said film should not be declared obscene and subject to be seized by Respondents; that Petitioners have and produce at said hearing a copy of said film, that said film be declared obscene and subject to seizure; and that Respondents be temporarily and permanently enjoined from exhibiting said film in Fulton County, Georgia.

Said Petition was filed on September 30, 1970, and a hearing thereon was scheduled for the next day, October 1, 1970. Said hearing was subsequently rescheduled after Petitioners filed a removal petition with the United States District Court on October 1, 1970. The movie began its run in Atlanta on October 1, 1970; and, on October 2, 1970 the above hearing was held, after Petitioner's Motion for Continuance had been denied.

The trial court held the film obscene, subject to seizure, and granted the relief prayed for and ordered "that all

copies in the possession of defendants be seized, and that defendants, their associates, agents, and employees, be restrained and enjoined from distributing, exhibiting, or otherwise showing the film in any theater or other place where the public is permitted within the jurisdiction of the Court." 227 Ga. at 378.

Petitioners appealed said judgment to the Georgia Supreme Court, citing seven enumerations of error: (1) That the trial court erred in determining the film to be obscene; (2) in enjoining Petitioner's from showing or exhibiting the film; (3) in ordering the film seized as contraband; (4) in utilizing the procedure involved in the absence of statutory standards, provisions for jury trial, and other constitutional safeguards; (5) in refusing the requested continuance; (6) in not holding that the State was precluded from litigating the film's obscenity by virtue of the 2nd circuit's decision thereon in 404 F.2d 196; and (7) in determining that the Georgia obscenity law extends to the exhibition of obscenity to consenting adults. 227 Ga. at 378.

In its decision the Georgia Supreme Court determined that: (1) the trial court did not err in declaring the film obscene; (2) that the trial court did not err in determining that it was not bound by the decision rendered by the United States Second Circuit Court of Appeals in *United States v. A Motion Picture Film Entitled "I am Curious—Yellow,"* 404 F.2d 196; (3) that the trial court did not err in enjoining the public exhibition of an obscene film; (4) that the trial court did not err in denying Petitioners' Motion for Continuance; and that (5) the trial court did not err in determining that the Georgia obscenity laws extend to the exhibition of obscene films to consenting adults.

In addition to the above, the Georgia Supreme Court made two additional rulings which relate directly to the question of finality. In the fourth division of the opinion, the Court determined that the trial court erred in permanently restraining and enjoining the Petitioners from exhibiting the film in an interlocutory hearing without a jury. The Court then directed that the order be revised to show that it was interlocutory in nature, and would only continue in force until the final hearing of the case by a jury. Likewise in the fifth division of said opinion the Court directed the trial court to modify its order by providing that "no destruction of the film be made unless and until a final determination is made by the jury that it (i.e. the film) is obscene." 227 Ga. at 383.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT HAS NO JURISDICTION TO REVIEW A DECISION OF THE GEORGIA SUPREME COURT WHICH IS NOT FINAL.

This Court's jurisdiction to review state court decisions by certiorari is set out in 28 U.S.C. Section 1257(3), which section provides that "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari . . . where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

It is apparent from a reading of the Georgia Supreme Court's decision that said decision is not "final", and contemplates that a jury trial is to be had on the material issues involved, including, but not limited to, the issue of the film's alleged obscene nature, whether it constitutes a public nuisance, caused and continued by Petitioners.

A State Court judgment to be within this Court's appellate jurisdiction must be final "in two senses: It must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." *Market St. Ry. Co. v. Railroad Commission of the State of California,* 324 U.S. 548, 551, 65, S.Ct. 770, 89 L.Ed. 1171 (1945), rehearing denied 324 U.S. 890, 65 S.Ct. 1020, 89 L.Ed. 1438. That the judgment be final is not merely a technicality, to be easily scorned, but an important factor in the smooth working of our federal system. *Montgomery Bldg. & Const. Trades Council v. Ledbetter Erection Co.,* 344 U.S. 178, 180, 73 S.Ct. 196, 97 L.Ed. 204 (1952) citing *Radio Station WOW v. Johnson,* 326 U.S. 120, 124, a judgment of the highest state court reversing the decree of the trial court in an equity cause, and remanding the cause for further proceedings in harmony with its opinion is not final within the meaning of said statute. *Schlosser v. Hemphill,* 198 U.S. 173 at 175, 25 S.Ct. 654, 49 L.Ed. 1000 (1905). See also *Coe v. Armour Fertilizer Works,* 237 U.S. 413 at 418, 35 S.Ct. 625, 59 L.Ed. 1027 (1915); *Pepper v. Dunlap,* 46 U.S. 51, 5 How. 51, 12 L.Ed. 46 (1847), *Morgan v. Thompson,* 124 F. 203, 59 C.C.A. 672, (Ind. T., 1903).

Compare the order in the case *sub judice* with the orders in *Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed. 2d 603 (1968) and *Mills v. State of Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed. 2d 484 (1966). See also *Moses v. The Mayor,* 82 U.S. 387, 15 Wall 387, 21 L.Ed. 176 (1873); *Verden v. Coleman,* 59 U.S. 86, 18 How. 86, 15 L.Ed. 272 (1855); *Gibbons v. Ogden,* 19 U.S. 448, 6 Wheat 448, 5 L.Ed. 302 (1821).

Thus where a trial court issues a temporary injunction, and a Motion to Dissolve the same is denied by said Court, and its decision is affirmed on appeal by the State Supreme Court, the Supreme Court's judgment is not a "final" judgment within the meaning of 28 U.S.C. Section 1257, and therefore is not reviewable by this Court. *Montgomery Building and Construction Trades Council, et al. v. Ledbetter Erection Co., Inc.,* 344 U.S. 178, 73 S.Ct. 196, 97 L.Ed. 204 (1952); *Gibbons v. Ogden,* 6 Wheat. 448, 19 U.S. 448, 5 L.Ed. 302 (1821).

Likewise where the State Supreme Court affirms a lower Court ruling granting a temporary injunction and remands the case back for a jury trial on the merits, its decision on the temporary injunction cannot be considered as a final determination of the issues (assuming the trial court had jurisdiction to grant the temporary injunction).

II. THE COMMERCIAL EXHIBITION OF AN OBSCENE FILM MAY BE ENJOINED AS A PUBLIC NUISANCE, EVEN THOUGH ITS EXHIBITION ALSO CONSTITUTES A CRIME.

In order to properly consider this issue it is necessary

to review the legal history culminating with the petition filed by Respondents in the present case.

During the period of time involved there took place in Fulton County, Georgia several police raids, pursuant to search warrants, which resulted in the seizure of allegedly obscene materials. The cases ultimately were decided by three-judge United States District Courts, said decisions were to the effect that this Court in *Marcus v. Search Warrants*, 367 U.S. 717 (1961), and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), (see also *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. (1968)), determined that no seizures of allegedly obscene materials could be had until after an adversary proceeding had determined that the material in question was obscene; and that since no adversary proceedings had been held prior to the seizures in said cases, the seizures were unlawful. See *Central Agency, Inc. v. Brown, et al.*, 308 F. Supp. 502 (N.D. Ga., 1969), *Gable v. Jenkins*, 309 F. Supp. 998 (N.D. Ga., 1969) aff'd per curiam 90 S.Ct. 1351 (1970), *Sherpix v. McAuliffe*, ... F. Supp. (unreported) (N.D. Ga., Sept. 2, 1969, C.A. No. 13024), see also *Carter et al. v. Gautier, et al.*, 305 F. Supp. 1098 (M.D. Ga. Sept. 15, 1969).

As a consequence of such decisions Respondents began instituting proceedings identical to the procedure in the case *sub judice*, the effect of which was to afford persons such as Petitioners the "required" adversary proceedings prior to seizure of allegedly obscene materials. See *Peachtree News Company, Inc., et al. v. Slaton, et al., Buckhead Books Mart et al. v. Slaton, et al.*, (two Cases), 226 Ga. 471 (1970), *Johnnie Reb's Book and Card Shop v. Slaton*, ... U.S. .....

(N.D. Ga., March 17, 1970, C.A. No. 13333). Indeed such procedures have inferentially been approved by this Court in its per curiam affirmance of *Gable v. Jenkins, supra,* see fn. 3 of argued opinion 309 F. Supp. at 1001. See also *Tyrone, Inc. v. Wilkinson,* 410 F.2d 639, 641 (4th Cir. 1969) cert. den. 396 U.S. 985 (1970).

The precise question of whether or not obscenity can be controlled by injunction is not new to this Court, and has been decided adversely to Petitioner's contentions. In *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1956) this Court upheld the constitutionality of a New York statute authorizing the injunction of obscene prints and articles by the Supreme Court of New York, without a jury, upon the complaint of the chief executive or legal officer of any city, town or village. In said decision this Court stated:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice. See *Tigner v. Texas,* 310 U.S. 141, 148. If New York chooses to subject persons who disseminate obscene "literature" to criminal prosecution and also to deal with such books as deodands of old, or both, with due regard, of course, to appropriate opportunities for the trial of the underlying issue, it is not for us to gainsay its selection of remedies." *Id.* at 441.

Kingsley Books is still good law as shown in *Freedman v. Maryland,* 380 U.S. 51, 60 (1960), a case strongly relied upon by Petitioners, but easily distinguishable

from the case *sub judice,* as is *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 141-142 (1969) also strongly relied upon by Petitioners. However, both of said cases dealt with the prior submission of films to censorship boards, and the evil condemned was not that such a procedure was not unconstitutional, but that in the instant case the statutes involved were unconstitutional because they did not provide for a prompt judicial determination of obscenity — a problem not involved here, since the order appealed was as a result of a judicial determination after the film was exhibited to the public.

Petitioners place their primary reliance on *Grove Press Inc. v. City of Philadelphia,* 418 F.2d 82 (1962). Their reliance is misplaced. The above case was decided in Grove Press's favor, not because the injunctive procedure is an impermissible method of dealing with obscenity, but because "there is no guarantee a final hearing will be seasonably scheduled after the issuance of a preliminary injunction and that a prompt decision will be forthcoming thereafter." *Id.* at 90. Such deficiencies, however, are not found in the Georgia procedure which is governed by statutory law, as set out as Petitioners' appendix "B", and by the Georgia Civil Practice Act (Ga. Laws 1966, p. 609, as amended, particularly by Ga. Laws 1969, p. 645, and Ga. Laws 1970, p. 170). Furthermore, this Court has tacitly approved the procedure utilized here in its affirmance of *Gable v. Jenkins, supra,* and the Georgia Supreme Court specifically found that the film was a public nuisance because it was found to be obscene.

A viewing of the film leads us to the conclusion that had the sexual scenes been performed live, they would have been in clear violation of Georgia Code Section

26-2011 (Ga. Laws 1968, p. 1249, 301). As such they constitute a prohibited lewd performance; and the premises where the performance takes place is a lewd house, and enjoinable as a public nuisance. Can the "heroine" be considered any less a prostitute merely because her services are performed in front of a camera, rather than behind closed doors and she is paid therefor by the movie producer rather than having payment made to her by her clients? We think not!

> "Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." 227 Ga. at 381.

It is because such conduct is offensive to the majority of the general public, that the evil of a lewd house or an obscene movie is amenable to injunction as a public nuisance.

III. THE PROCEDURE USED IN THIS CASE TO ENJOIN THE FILM'S EXHIBITION DOES NOT OFFEND DUE PROCESS.

In the main, the issues raised by Petitioners as procedural defects in the Georgia procedure utilized, have been decided adversely to Petitioners in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, which statute allowed injunctions *pendente lite,* and contained no requirement for a jury trial on the issue of obscenity. Additionally,

a distinction should be made between what Petitioners claim might have happened on the face of the statute, and what actually transpired. For, it is not the face of a state statute that governs its constitutionality but how it is construed and applied. *Younger v. Harris, et al,* 401 U.S. 37, n.4 (1971); *Dombrowski v. Pfister,* 380 U.S. 479, n.7 (1965).

Thus the case involved no ex parte injunction, nor did it involve a delay between filing the complaint, and obtaining a judicial decision. Indeed, the Georgia Supreme Court's interpretation of the decision, which interpretation is binding on the trial court, is more restrictive than the New York statute held constitutional. The Georgia Supreme Court is requiring that the case be remanded for a jury trial in accordance with Georgia Code Section 72-201.

Thus this Court is not concerned with the face of the statutes, if any construction or application thereunder is constitutional; and particularly, what construction and application have actually been utilized. Here no ex parte injunction was issued; the hearing was timely; the court's decision after hearing was timely; the appeal and appellate decision was heard and decided within a reasonably short time; and no doubt a jury trial on the hearing for a permanent injunction will be accomplished within constitutional time limits.

Additionally, the burden of proving the film obscene was carried by Respondents, who will likely do so again in the subsequent jury hearing. (Note: Although Petitioners take the position that due process requires that the State actually prove contemporary community standards, social value, and purient appeal, Respondents stand on

the position that the film speaks for itself, and that the Court can take notice of its contents when introduced into evidence and determine, as a question of law, its obscenity. We do not intend, thereby, to get trapped into conducting a battle of expert witnesses, when this Court utilizes the same procedure in deciding obscenity. See *Redrup v. New York,* 386 U.S. 767 (1967). Accordingly, except for deviant material, either a Court or a jury is capable of deciding those issues without resorting to a sifting of conflicting testimony by "expert" witnesses and poll takers. Does a judge or juror really have to hear testimony from a third person to know whether or not a particular movie offends the standards of the community in which he lives, is intended to appeal to a purient interest, or is utterly without social value? These are matters within ordinary common sense and everyday living. Does the fact that an "expert" witness is willing to testify that the national community standards are reflected by the standards of San Francisco, California, which allows waitresses to go both topless and bottomless, and that another "expert" witness testifies to the contrary, alter what the juror knows of his own knowledge. Again we think not! While we concur with the statement in *Freedman v. Maryland, Id.* at 58, to the effect that the burden of proving obscenity rests upon those who seek to prohibit it, we believe that the highest and best evidence of such is the material itself.)

IV. THE FILM "I AM CURIOUS (YELLOW)" IS OBSCENE.

As Petitioners correctly observe there is a myriad of cases on the question of this film's obscenity. At least

one federal appellate circuit has determined that it is not. On the other side of the coin many jurisdictions have disagreed. Indeed, a number of such cases are presently pending before this Court on applications for certiorari. See *Grove Press, Inc. v. Flash,* docket number 70-1; *Faircloth v. M. & W. Theaters,* docket number 70-10; *Grove Press, Inc. v. Barley,* docket No. 70-24, are but three in addition to this case. However by an equally divided court, this Court affirmed *Grove Press, Inc. et al. v. Maryland State Board of Censors,* 401 U.S. 480, 91 S.Ct. 966, 28 L.Ed. 2d 205 (1971), which decision declared the film obscene.

CONCLUSION

For all the foregoing reasons, Respondent urges this Court to decline to issue the Writ of Certiorari in this case.

Respectfully submitted,
Original Pen Signed By.

LEWIS R. SLATON
District Attorney
Atlanta Judicial Circuit
Original Pen Signed By.

JOEL M. FELDMAN
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States in good standing, and that I have this day deposited in the United States Post Office, Atlanta, Georgia, three copies of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari with first class postage prepaid addressed to Mr. Glenn Zell, Esquire, 725 Candler Building, Atlanta, Georgia 30303, counsel of record for Appellant.

This 8th day of ~~September~~ October, 1971.

Original Pen Signed By

JOEL M. FELDMAN
Assistant District Attorney
Atlanta Judicial Circuit

APPENDIX A

Georgia Criminal Code Chapter 26-21, Distributing Obscene Materials (Ga. Laws 1968, p. 1249, as amended by Ga. Laws 1970, p. 173 and Ga. Laws 1971, p. 344).

"26-2601. (sic) (i.e. mistake in amended law, should actually be 26-2101) DISTRIBUTING OBSCENE MATERIALS.—(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or who offers to do so, or who possesses such material with the intent so to do. Provided, that the word 'knowing' as used herein shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter; and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material." (1971 amendment).

(b) Material is obscene if considered as a whole, applying community standards, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex or excretion, and utterly without redeeming social value and if, in addition, it goes substantially beyond customary limits of candor in describing or representing such matters. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(c) Material, not otherwise obscene, may be deemed obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(d) A person convicted of distributing obscene material shall for the first offense be punished as for a misdemeanor, and for any subsequent offense shall be punished by imprisonment for not less than one nor more than five years, or by a fine not to exceed $5,000, or both.

26-2102. DISTRIBUTING MATERIAL DEPICTING NUDITY OR SEXUAL CONDUCT.—(a) A person commits the offense of distributing material depicting nudity or sexual conduct when he sends unsolicited through the mail, or otherwise unsolicited causes to be delivered, material depicting nudity or sexual conduct to any person or residence or office unless there is imprinted upon the envelope or container of such material, in not less than eight point boldface type, the following notice:

"Notice—The material contained herein depicts nudity or sexual conduct. If the viewing of such material could be offensive to the addressee, this container should not be opened but returned to the sender."

(b) As used within this section "nudity" means the showing of the human male or female genitals, public area or buttocks with less than a full opaque covering, or the depiction of covered male genitals in a discernibly turgid state, and "sexual conduct" means acts of masturbation, homosexuality, sodomy, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, public area, buttocks or, if such person be female, breast.

(c) A person convicted of distributing material depicting nudity or sexual conduct shall be punished by imprisonment for not less than one nor more than three years, or by a fine not to exceed $10,000, or both. (1970 amendment).

"26-2103. The use of any premises in violation of any of the provisions of this Chapter shall constitute a public nuisance." (1971 amendment, § 26-2103 - § 26-2106).

"26-2104. Any materials declared to be obscene by the provisions of this Chapter and advertisements for such materials are hereby declared to be contraband."

"26-2105. (a) Every person who, during the course of a play, night club act, motion picture, television production or other exhibition, or mechanical reproduction of human conduct, engages in conduct which would be public indecency under Code section 26-2011 if performed in a public place, shall be guilty of participation in indecent exposure and upon conviction shall be punished as for a misdemeanor.

(b) Every person who procures, counsels or assists any person to engage in such conduct or who knowingly exhibits or procures, counsels or assists in the exhibition of a motion picture, television producton or other mechanical reproduction containing such conduct shall be guilty of a misdemeanor."

"26-2106. If any provision of this Chapter or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this Chapter which can be given effect without the invalid provision or application, and to this end the provisions of this Chapter are declared to be severable."

APPENDIX B

Georgia Criminal "Code" Section 26-2011, Public Indecency (Ga. Laws 1968, p. 1249).

26-2011. PUBLIC INDECENCY.—A person commits public indecency when he performs any of the following acts in a public place and upon conviction shall be punished as for a misdemeanor:

(a) An act of sexual intercourse;

(b) A lewd exposure of the sexual organs;

(c) A lewd appearance in a state of partial or complete nudity;

(d) A lewd caress or indecent fondling of the body of another person.

APPENDIX C

Ga. Appellate Procedure Act, Section 1(a)(3) (Ga. Laws 1965, p. 18, as amended, particularly by Ga. Laws 1968, p. 1072).

"Section 1. (a) Appeals may be taken to the Supreme Court and Court of Appeals from judgments and rulings of the superior courts, the constitutional city courts, and such other courts or tribunals from which writs of error are authorized by the Constitution and laws, in the following instances:

* * *

(3) From all judgments involving applications for discharge in bail trover and contempt cases; from all judgments or orders directing that an accounting be had; from all judgments or orders granting or refusing application for receivers, or for interlocutory or final injunction; from all judgments or orders rendered after hearing, continuing in effect, modifying, vacating, or refusing to continue, modify or vacate a temporary restraining order; from all judgments or orders granting or refusing applications for attachment against fraudulent debtors; from all judgments or orders granting or refusing to grant applications for alimony, either temporary or permanent, mandamus or other extraordinary remedy; from all judgments or orders refusing applications for dissolution of corporations created by the superior courts; and from all judgments or orders sustaining a motion to dismiss a caveat to the probate of a will.

APPENDIX D

Georgia Civil Practice Act, Section 81A-152(a) (Ga. Laws 1966, p. 609, as amended, particularly by Ga. Laws 1970, p. 170).

"Section 81A-152. (a) Effect. In all actions in Superior Court tried upon the facts without a jury, except actions involving only uncontested divorce, alimony and custody of minors, the court shall find the facts specially and state separately its conclusions of law thereon and judgment shall be entered pursuant to section 81A-158; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Section 81A-112 or 81A-156 or any other motion except as provided in Section 81A-141(b). The requirements of this subsection may be waived in writing by the parties. Provided, all verdicts and judgments heretofore rendered in any uncontested divorce, alimony or custody case without findings of fact and conclusions of law are hereby declared to be legal and binding and of the same effect as if such cases had been rendered with findings of fact and conclusions of law."